83-864

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. .....

KENNETH JOE WHITTEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an appropriate remedy pursuant to the dictates of the Fourth (4th) Amendment to the United States Constitution is to admit items into evidence which are seized within the authorization of a warrant even though the admitted evidence, in addition to other seized items not offered into evidence, is seized as a result of a search conducted in a manner found to exceed the bounds of reasonableness and limitations of the warrant?

2. Whether the Fourth (4th) Amendment and the "plain view" exception to the warrant requirement can be construed in such a manner as to permit the warrantless rewinding and listening to a tape from a telephone answering machine?

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TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH JOE WHITTEN, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case May 25, 1983. A petition for rehearing was denied September 30, 1983.

OPINION BELOW

The opinion of the Court of Appeals is reported at 706 F.2d 1000. A copy is set forth in the Appendix. The opinion of the Court of Appeals on petition for rehearing is unreported. A copy is set forth in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered May 25, 1983. Petition for Rehearing was denied September 30, 1983.

Jurisdiction to issue the writ is invoked pursuant to the provisions of Title 28, Section 1254(1), United States Code.

CONSTITUTIONAL PROVISIONS

The Fourth (4th) Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On August 7, 1981, the Grand Jury for the United States District Court for the Southern District of California returned a twenty-one (21) count indictment naming Petitioner, KENNETH JOE WHITTEN, and twenty-three (23) other individuals as Defendants in connection with an investigation spearheaded by the Drug Enforcement Administration (DEA) concerning the manufacture and distribution of methamphetamine. Shortly thereafter, on August 18, 1981, Petitioner, KENNETH JOE WHITTEN, was arrested in Alpine, California.

The investigation had commenced on April 2, 1980. On that date, an individual named Deborah Howard was arrested at Las Vegas, Nevada. Ms. Howard agreed to cooperate with law enforcement agents and provided them with information concerning the manufacture and distribution of methamphetamine. According to Deborah Howard, methamphetamine was being manufactured at a sight bearing the street address of 115 South Midway Drive, Escondido, California. Based upon the information supplied by Ms. Howard, a search warrant was obtained and on April 15, 1980, DEA agents commenced a search at 115 South Midway Drive.

The search resulted in seizure of more than one thousand (1,000) photographs, several hundred documents, and a variety of other items. The documents, photographs, and other materials were moved to the DEA offices where they were received to develop leads and other evidence in the case. The final result being, over a year later, the indictment of KENNETH JOE WHITTEN on August 7, 1981.

The indictment of August 7, 1981 had been sealed so that the DEA could effectuate and coordinate arrests of a substantial number of Co-Defendants before the existence of the indictment was generally known. Originally, the DEA planned to effect the arrest on August 19, 1981, but an agent in Texas precipitously served Defendant Jack Gish with an arrest warrant on August 18, 1981. Mr. Gish was at the time incarcerated in the Texas Department of Corrections. Upon discovering the premature execution of the arrest warrant for Mr. Gish, DEA agents in the San Diego area proceeded immediately to a location at 9898 Silva Road in El Cajon, California, which they believed to be the residence of KENNETH JOE WHITTEN. Appropriately, the agents obtained a "Prescott" warrant authorizing them to search the premises at 9898 Silva Road for the person of KENNETH JOE WHITTEN.

The testimony reflects that some thirty to ninety (30-90) minutes after the search for WHITTEN had been completed, the DEA agents heard an incoming telephone call which was broadcast into the room by a telephone answering machine which was simultaneously recording the caller's message. An agent recognized the voice of the caller as being WHITTEN's wife, Sue Hickey, also named as a Co-Defendant in this case. After some discussion as to whether or not the tape should be replayed so that the agents could listen to and hear the recorded message, the agents rewound the tape. The tape was rewound past the Hickey call; thereupon, the agents listened

to the entire tape and learned from an earlier message, by a different caller, the location of WHITTEN and the location of additional evidence. Based upon this information, KENNETH JOE WHITTEN was arrested and the additional evidence was seized.

Following the arrest of Petitioner, a superseding indictment was returned adding an additional three (3) counts arising out of the evidence obtained in the course of effecting the arrest of Petitioner. The case was called to trial by a jury commencing February 23, 1982, before the Honorable Judge Howard B. Turrentine, United States District Judge, presiding. After seven (7) days of testimony, the jury retired to consider their verdict and on March 8, 1982, Petitioner was found guilty on all counts for which he had been charged. May 10, 1982, Petitioner was sentenced to serve twenty (20) years imprisonment on the continuing criminal enterprise conviction, five (5) years on each of the conspiracy counts, five (5) years on the interstate travel count, and four (4) years on each of the other counts. Additionally, the Petitioner was ordered to pay fines totaling TWO HUNDRED THOUSAND AND NO/100 DOLLARS ($200,000.00).

Prior to trial, Petitioner filed various pre-trial motions including, specifically, a Motion to suppress the evidence seized pursuant to the search conducted at 115 South Midway Drive and a Motion to suppress the evidence seized during the execution of the Prescott warrant at 9898 Silva Road in El Cajon, California. After considering testimony, written motions, and argument of counsel, the District Court overruled Petitioner's pre-trial motions initially from the bench and thereafter by order filed by January 7, 1982. Accordingly, on appeal to the United States Court of Appeals for the Ninth (9th) Circuit, the Petitioner asserted, among other issues, that the District Court erroneously overruled Petitioner's Motion to suppress the evidence and the fruits

thereof seized pursuant to the unreasonable search conducted at 115 South Midway Drive, and that the District Court additionally erroneously overruled Petitioner's Motion challenging the officers' conduct in their warrantless rewinding and listening to the tape on the telephone answering machine during the execution of the Prescott warrant at 9898 Silva Road, El Cajon, California.

As to Petitioner's contentions regarding the search conducted at 115 South Midway Drive, Escondido, California, one of the basis upon which the Petitioner challenged the search was that the executing officers exceeded the scope of the warrant and transformed the judicial authorization into a general exploratory search. The Court of Appeals, in concluding that "although the manner in which it was conducted was in some respects irregular," held that the search was lawful and found that even though the search was not "scrupulously confined to the terms of the warrant," it did not "necessarily follow that all of the evidence seized must be suppressed." In sum, the Court of Appeals concluded that the executing officers did conduct an unconstitutional, general search by exceeding the limitations of the warrant, nevertheless, permitted introduction of evidence seized during that illegal search on the theory that the only evidence actually introduced at trial were items which could have been lawfully seized pursuant to the warrant if it had been properly executed.

As to Petitioner's challenge to the search at 9898 Silva Road, El Cajon, California, one of the grounds upon which Petitioner relied in seeking to suppress evidence was that the officers' conduct in rewinding and listening to the tape on the telephone answering device, after having executed a Prescott warrant and after having ascertained that WHITTEN was not present at that location, was violative of the Fourth (4th) Amendment to the Constitution of the United States. The

Court of Appeals rejected various arguments to the challenge of the search of the tape and concluded, as did the District Court, that: (a) there was no legitimate expectation of privacy in the Hickey call, either "live" or "taped", and (b) the subsequent search of the contents of all earlier recorded messages was authorized and valid pursuant to the "plain view" exception to the warrant requirement.

REASONS FOR GRANTING THE WRIT

I. As To The Constitutionality Of The Search Conducted At 115 South Midway Drive, Escondido, California

The Fourth Amendment condemns "unreasonable" searches and seizures. The Supreme Court has heretofore held that suppression of evidence seized as a result of an "unreasonable" search is the appropriate remedy. In regards to this principle, this Court has commented:

> "The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initation. *Compare Katz* v. *United States*, 389 U.S. 347, 354-356, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). The entire deterrent purpose of the rule excluding evidence seized in violation of the Fourth Amendment rests on the assumption that 'limitations upon the fruit to be gather tend to limit the quest itself.' *United States* v. *Poller*, 43 F.2d 911, 914, 74 A.L.R. 1382 (C.A.2d Cir. 1930); *see*, e.g., *Linkletter* v. *Walker*, 381 U.S. 618, 629-635, 85 S.Ct. 1731, 1741, 14 L.Ed.2d 601 (1965); *Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Elkins* v. *United States*, 364 U.S. 206, 216-221, 80 S.Ct. 1437, 1446, 4 L.Ed.2d 1669 (1960). Thus, evidence may not be introduced if it was discovered by means of seizure and search which were not reasonably related in scope to the justification for their initiation. *Warden* v. *Hayden*, 387 U.S. 294, 310, 87 S.Ct. 1642, 1652, 18 L.Ed.2d 782 (1967) (Mr. Justice Fortas, concurring)."

Terry v. *Ohio*, 392 U. S. 1, 28-29 (1968).

Notwithstanding this general rule, in the instant case, the Ninth Circuit's holding carves out a new exception to the rule, to wit: even if a search is conducted in an unreasonable manner, evidence resulting therefrom need not be suppressed if it could have been properly seized in the course of a "reasonable" search. The implication of this new doctrine, which this Court has not heretofore undertaken, constitutes a very substantial curtailment of the suppression rule and sets forth a novel holding of monumental significance in Fourth Amendment jurisprudence. Accordingly, the issue warrants the scrutiny and consideration of this Court and a determination as to whether the conduct in this case meets the Fourth Amendment's general proscriptions against unreasonable searches and seizures.

"[T]he Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant[.]" *Bivens* v. *Six Unknown Agents*, 403 U.S. 388, 394 n.7 (1971). Accordingly, the warrant cannot be executed in such a manner that constitutes an unconstitutional, general, exploratory rummaging prohibited by the Fourth (4th) Amendment. The search itself must be executed in a "reasonable" manner, limited in scope and intensity. *(See, e.g, Terry* v. *Ohio*, 392 U.S. 1 (1968) wherein this Court stated that in the past the Court has found that a search reasonable at its inception may violate the Fourth (4th) Amendment by virtue of its "intolerable intensity and scope").

In the instant case, the interpretation by the agents of the language of the warrant transformed the judicial authorization fundamentally into a license for wholesale, unbridled investigatory rummaging through and seizure of all personal

belongings and private papers located at the subject's premises. To Agent Austin, the individual in charge of the execution of the warrant and interpretation thereof, the term "correspondence" contained in the warrant encompassed any piece of paper that had the name of somebody on it that was on the premises. Additionally, the term "photographs" was interpreted to mean not merely all observable pictures on the premises, but even undeveloped film found in cameras. The agents made no effort whatsoever to limit their seizure to the specific items mentioned in the warrant. None of the agents were shown a copy of either the warrant or the affidavit. The agent in charge, Agent Austin, did not even have the warrant in his possession during the search. The briefing session conducted at the DEA office prior to the execution of the search warrant focused on the deployment plan strategy rather than training the agents concerning the scope of the search to be conducted. The strategy of the executing officers was simply to seize anything which, at first glance, appeared to have some relevance to the investigation irrespective to whether or not the item was specified in the warrant, take the seized items back to the DEA office where they could be perused and studied "more leisurely" and in greater detail, and merely return the seized materials not covered in the warrant upon request "later on if it was not relevant to providing us with some kind of information." Resultingly, the agents received a large number of items which were clearly not within the scope of the search warrant nor, for that matter, relevant to the investigation.

In sum, virtually all constitutional imperatives were disregarded by the agents in this case. The agents were looking for anything that could be used as evidence, irrespective of whether such items were in the descriptions contained in the warrant. Unconstrained by any warrant particularity limitations, the agents were admittedly on an exploratory fishing

expedition hoping "to develop other names of people who might be involved" and "to develop other leads that might lead to other areas in furtherance of this investigation." It is difficult to imagine a more indiscriminate, general rummaging through a persons belongings than the search and seizure which occurred at South Midway Drive on April 15, 1980. It would seem that Mr. Justice Stewart possessed clairvoyance predicting precisely the events that transpired in connection with the search and seizure herein complained of when he wrote in *Stanley* v. *Georgia*, 394 U.S. 557, 571-72 (1969):

> "Even in the much criticized case of *United States* v. *Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653, the Court emphasized that 'exploratory searches *** cannot be undertaken by officers with or without a warrant.' *Id*, at 62, 70 S.Ct., at 434. This record presents a bald violation of that basic constitutional rule. To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal pow - of a general warrant."

See also, Walter v. *United States*, 447 U.S. 649 (1980).

The Ninth Circuit, however, remarkably upheld the District Court's denial of Petitioner's Motion to Suppress on this issue, stating that the search was not scrupulously confined to the terms of the warrant and they disapproved "of the removal by the agents from the house of large quantities of papers, photographs, and other items which *might* have been relevant to who lived or worked there. Nevertheless, since (a) all the items seized at Midway Road were later admitted into evidence were items which the DEA agents were authorized to take under the warrant, (b) the judge ordered the return of the non-relevant items, and (c) the search did not reflect flagrant disregard for the terms of the warrant, the Court held the admissibility of items which did fall within the

authorization of the warrant was unaffected. Moreover, the Court did not address the problem of the tainted use of the illegally seized items being utilized as investigative leads to develop evidence which was introduced at trial (as the agents had admittedly done). The Court concluded, in essence, that the search taken as a whole exceeded the bounds of reasonableness; nonetheless, the fruits of that search need not be suppressed because if the search had been "reasonable" its result would have been the seizure of the evidence ultimately introduced at trial.

In so holding, the decision sets forth a new exception, not yet addressed by this Court, to the heretofore Supreme Court holding that suppression of evidence seized as a result of an "unreasonable" search is the appropriate course of action. Petitioner submits to this Court that this novel issue and holding merits, warrants and justifies the grant of Certiorari to review the judgment below.

II. As To Constitutionality Of The Seizure And The Search Of The Tape Recording At 9898 Silva Road, El Cajon, California

The decision below raises significant Fourth (4th) Amendment questions involving the limitations of "a legitimate expectation of privacy" and an extension of the "plain view" exception to the warrant requirement which merit consideration by this Court.

The rewinding and listening to the telephone answering device (and the subsequent warrantless seizure thereof) is plainly, indisputably, and blatantly violative of the proscriptions of the Fourth (4th) Amendment to the Constitution of the United States. In the instant case, the agents had a warrant authorizing them to conduct a very limited search, mainly a search of the premises for the person of KENNETH WHITTEN. After they had ascertained that WHITTEN was not present at location, they unlawfully remained on the

premises and thereafter extended the search to listen to the tape on the telephone answering device. Clearly, this action was not authorized by the warrant.

> "When an official search is properly authorized — whether by consent or by the issuance of a valid warrant — the scope of the search is limited by the terms of its authorization. Consent to search a garage would not implicitly authorize a search of an adjoining house; a warrant to search for a stolen refrigerator would not authorize the opening of desk drawers. Because "indiscriminate searches and seizures conducted under the authority of "general warrants" were the immediate evils that motivated the signing and adoption of the Fourth (4th) Amendment," *Payton* v. *New York*, 445 U.S. 573, 583, 100 S.Ct. 1371, 1378, 63 L.Ed.2d 639, that Amendment requires that the scope of every authorized search to be particularly described."

Walter v. *United States*, 447 U.S. 649, 656-657 (1980).

Consistently with the constitutional mandate that "even searches deemed necessary and supported by a magistrate's determination of probable cause should be as limited as possible," *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971), the warrant in this case authorized the search at the premises of 9898 Silva Road only "for the person specified" and permitted the seizure only of "him/her". The scope of the search authorized was explicitly limited to those parameters.

Nevertheless, in overruling Petitioner's challenge to the search of the tape, the Court of Appeals found, as did the District Court: first, there was no legitimate expectation of privacy in the Hickey call, either "live" or taped", and, second, the subsequent search of the contents of the earlier recorded messages were authorized pursuant to the "plain view" exception to the warrant requirement.

With respect to the first issue, i.e., a finding of no legitimate expectation of privacy in the Hickey call, the Ninth Circuit conceptually failed to differentiate between the "live" communication by Hickey and the "taped" recording memorializing that communication. In so doing, the Ninth Circuit's decision in this case is in direct conflict with, and cannot be reconciled, with this Court's decision in *Walter* v. *United States*, 447 U.S. 649 (1980). In *Walter*, the Defendant had "broadcast" the contents of certain films by placing them in boxes which contained explicit descriptions of the contents, as well as suggestive drawings. Nonetheless, the Supreme Court ruled that informing third parties of the contents of the film did not destroy the legitimate expectation of privacy in the films themselves. Because the agents had viewed the films without a search warrant, the Court held that the viewing of the films constituted a search of their contents and that, notwithstanding the fact that their possession of the films was lawful, the agents needed a search warrant before they could view the films.

The *Walter* case is of obvious controlling significance in the present case and the same analysis and results should obtain here. Accordingly, even assuming as the lower courts held in the instant case, that there was no legitimate expectation of privacy in the "live" Hickey call, Petitioner's argument is directed toward the seizure of the "tape" which memorialized the Hickey message; specifically, Petitioner challenges the lower courts finding that there was no legitimate expection of privacy in the tangible property, i.e., the taped recording which memorialized the Hickey call and other previously recorded messages. Pursuant to the dictates of the Fourth (4th) Amendment as set forth in *Walter*, the lower courts should have appropriately found that merely informing the overhearers of part of the contents of the tape, by permitting the live conversation to be heard in the room, did not deprive

Petitioner from maintaining a legitimate expectation of privacy in the tape itself.

Additionally, with regard to the second issue addressed, i.e., the Ninth Circuit's upholding the search of the earlier recorded messages pursuant to the "plain view" exception to the warrant requirement, the Court upheld the search on this basis by inappropriately failing to address Petitioner's argument that the "plain view" exception was unavailable because the agents were not lawfully on the premises, and ultimately concluding that the trial court's finding that the agents conduct was inadvertent in completely rewinding the tape and hearing the earlier recorded messages in their entirety was not a clearly erroneous ruling.

In so holding, the Ninth Circuit has avoided directly addressing an important Fourth (4th) Amendment issue, to wit: whether the "plain view" exception to the warrant requirement can be construed in such a manner as to permit the warrantless rewinding of and listening to a tape from a telephone answering machine. Moreover, and of equal importance, in finding that the warrantless search and seizure of the tape was justified pursuant to the "plain view" exception, the Ninth Circuit decision is in direct conflict with this Court's decisions which set forth the "immediately apparent incriminating" requirement of evidence seized in plain view. *See Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

The Ninth Circuit discusses two issues in their application of the "plain view" exception to this case: first, whether at the time the agents came across the recorded messages they were lawfully on the premises, and, second, assuming their lawful presence, whether they came across it inadvertently.

With regard to the first issue, the Ninth Circuit held that Petitioner's argument that agents were not lawfully on the premises was unavailable because it had not properly been

brought to the attention of the trial court. Petitioner would have this Court note that the Ninth Circuit's conclusion that the Petitioner did not adequately raise this issue in the trial court (assuming it was Petitioner's responsibility to do so), is premised upon an improper construction of the record. The opinion seems to treat counsel's statement that he "mean[t] to give the government equal time to respond" as a partial concession that the government had not been put adequately on notice of the issue and argument. In reality, counsel's comment referred to the fact that the Court had set strict time limits on concluding oral arguments, and counsel was merely trying to give the government a fair opportunity for oral argument before the 4:30 deadline imposed by the court. In point of fact, as footnote 3 of the panel's opinion demonstrates, counsel did *clearly* bring to the court's attention Petitioner's position that the agents were not legitimately on the premises at the time of overhearing of the telephone call, and the government responded to that argument. The government clearly understood that the Petitioner was arguing that the agents were no longer lawfully on the premises at the time the Hickey call was overheard, and sought to answer that argument.

Nevertheless, and without waiving the foregoing objection, if, as the Ninth Circuit concludes, the record is insufficiently developed to permit appellate consideration of the lawfulness or unlawfulness of the agents presence on the premises, then *a fortiorari* the Government, not the Petitioner, failed to discharge their burden of proof. "[T]he most basic constitutional rule in this [Fourth (4th) Amendment] area is that 'searches conducted outside the judicial process, without prior approval by the judge or magistrate, are *per se* unreasonable under the Fourth (4th) Amendment — subject only to a few specifically established and well delineated exceptions." [Footnote citing *Katz* v. *United States*, 389 U.S. 347 (1967)

omitted.] The exceptions are 'jealously and carefully drawn' [footnote citing *Jones* v. *United States*, 357 U.S. 493 (1958) omitted] and there must be *'a showing by those who seek exemptions* * * * that the exigencies of the situation made that course imperative.' [Footnote citing *McDonald* v. *United States*, 335 U.S. 451 (1948) omitted]. *[T]he burden is on those seeking the exemption to show the need for it.* [Footnote citing *United States* v. *Jeffers*, 342 U.S. 48, 51 (1951) omitted]." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-55 (1971) (emphasis supplied).

Since the Government was relying on an exception to the warrant requirement to justify the warrantless search, it was for the Government to show, by record evidence, that the agents were lawfully on the premises. Given the Ninth Circuit's rationale that the record is insufficiently factually developed to permit a determination as to whether the officers were lawfully on the premises, the Petitioner should have prevailed on this issue as a matter of law. Accordingly, the decision effectively reversed the burden of proof on the issue, transferring to Petitioner the burden of disproving that which the Government has a burden affirmatively to establish. This holding is clearly irreconcilable with existing Supreme Court authority.

Had the Ninth Circuit appropriately confronted the issue, the Court would have had to determine whether the officers were lawfully on the premises at the time they overheard the Hickey call since the "plain view" exception applies only when the officers inadvertently see something at a place where they are lawfully authorized to be. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1970). In the instant case, the exception was clearly inapplicable in that, at the time the officers overheard the call, they had already completed the search pursuant to the Prescott warrant some thirty (30) to ninety (90) minutes earlier. The agents had no reason to remain

inside the premises after completion of their execution of the Prescott warrant; therefore, at the time the call was overheard, the officers presence at the scene could not be characterized as either legitimate or lawful.

Furthermore, with regard to the second issue addressed by the Ninth Circuit in respect to the "plain view" exception, i.e., a finding that the officers conduct was inadvertent in completely rewinding and hearing the earlier recorded messages, the Court merely concludes that the trial court's finding of "inadvertence" was not clearly erroneous. The Ninth Circuit seemingly came to this conclusion by conceptually failing to adequately differentiate between the live conversation the agents overheard and the the tape recording embodying that and other conversations. (See discussion *supra*). Therefore, by inappropriately legitimizing the conduct of the agents in rewinding the tape for the specific purpose of listening to the Hickey call on the basis that Petitioner had no legitimate expectation of privacy in the Hickey call, either live or taped, the Court was then able to justify the rewinding past the Hickey call under the "inadvertence" theory.

Respectfully, even if this analysis appears to be some explanation for how the Ninth Circuit arrived at their remarkable conclusion that the deliberate rewinding of the tape was inadvertent, there is no explanation for the Court announcing a decision which completely fails to meet the "immediately apparent incriminating" requirement of the "plain view" doctrine.

This Court set forth in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1970), that the plain view exception "is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last

emerges." *See generally* 2 La Fave, SEARCH AND SEIZURE, § 4.11(c) and § 6.7(b) and cases cited therein.

In the instant case, what and all the agents heard (prior to replaying the tape) was: (1) Sue Hickey's voice and (2) a message either to the effect that "the narcs [were] looking for [her]" or simply requesting that KENNY call her. Indeed, it was precisely because the agents had *not* heard anything incriminating when the conversation was initially overheard, that they felt constrained to replay the tape in hopes of learning something new which they had not heard before. Had the agents sought a warrant to search the tape after hearing the Sue Hickey call, one clearly could not have issued, for there was no probable cause sufficient to show a nexus between the evidence sought to be seized and criminal conduct.

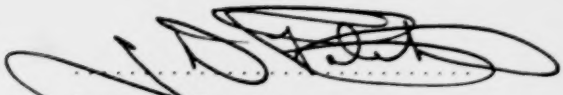
If the information at hand is not sufficient to constitute probable cause to search, it certainly is not sufficient to permit a warrantless search. Yet, that is, effectively, the result of the Ninth Circuit's opinion thereby rendering the decision in conflict with the dictates of the Fourth (4th) Amendment to the United States Constitution.

In sum, the Ninth Circuit's decision with regard to the "tape" issue is far reaching in that the Court significantly curtails application of "the legitimate expectation of privacy" principle and thereafter extends the application of the "plain view" exception. The opinion effectively sets forth a decision in conflict with decisions of this Court in the area of Fourth (4th) Amendment jurisprudence. Accordingly, Supreme Court consideration of this issue is clearly indicated.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, JERRY D. PATCHEN, as Counsel for Petitioner herein, hereby certify that three (3) true and correct copies of the foregoing Petition for a Writ of Certiorari have been served upon the Solicitor General of the United States by placement in the United States mails, first-class, postage prepaid, on this the 23 day of November, 1983.

REX E. LEE
Solicitor General of the United States
Department of Justice,
Office of the Solicitor General
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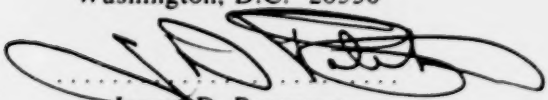
Room 5614
Washington, D.C. 20530



JERRY D. PATCHEN

APPENDIX

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v.	Nos. 82-1315 82-1293 82-1294 82-1303
KENNETH JOE WHITTEN JOHN ELMER GAIEFSKY JACK WAYNE GISH RICHARD LAWRENCE SHIMEL, *Defendants-Appellants.*	D.C. No. 81-1049-T

OPINION

Argued and Submitted — January 5, 1983

Decided — May 25, 1983

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Honorable Howard B. Turrentine, District Judge, Presiding

Before: FARRIS and ALARCON, Circuit Judges, and SCHWARZER,*

SCHWARZER, District Judge:

Kenneth Whitten and twenty-three codefendants were charged in a twenty-four count indictment with making and selling methamphetamine. The trial court severed the case against four defendants, Whitten, Shimel, Gaiefsky, and Gish, who now

* The Honorable William W Schwarzer, United States District Judge for the Northern District of California sitting by designation.

appeal from their convictions of various narcotics offenses in violation of 21 U.S.C. §§ 841(a)(1), 846, 843(b), and 848.

Appellants were charged with operating illegal methamphetamine laboratories in Texas and California and with marketing the drug in a number of states. A key point of distribution was Las Vegas, where Debra Howard was arrested, on unrelated charges, on April 2, 1980. Howard agreed to cooperate with federal drug enforcement officials. Based on her information, the police in California and Texas made a number of arrests and searched a number of different locations. Appellants challenge the legality of these searches and seizures. They also contest the sufficiency of the evidence supporting their convictions and challenge various evidentiary rulings of the trial court. We will consider the claims raised by each appellant in turn.

WHITTEN'S APPEAL

I. Sufficiency of the Evidence

A. *Money Order Counts*

Appellant Whitten was convicted of seven counts of using Western Union money orders to facilitate the distribution of methamphetamine (Counts 10-17). The indictment names specific dates on or about which telegraphic money orders were used in drug transactions. At trial, the government introduced into evidence more than thirty money orders and Western Union money order applications. For each date named in the indictment, there is a corresponding money order in which one of the indicted coconspirators or a government witness is the recipient of a large sum of money. The amounts vary but are generally between $2,000 and $6,000.

Roger Loving, an indicted coconspirator separately tried, testified that Whitten customarily used money orders for drug sales. He also testified to personally receiving money orders from a woman named "Pat" in Lubbock, Texas. On Whitten's

instructions, he cashed the money orders and gave him the proceeds. Count 13 of the indictment charges Whitten with use of a Western Union money order on or about March 28, 1980, to aid methamphetamine sales. A money order dated March 28, 1980, in the amount of $2,115.65 made out to Roger Loving from Pat Sharp of Lubbock, Texas, was introduced at trial.

Patti Hickey, mother of one of the indicted conspirators, testified that on four or five occasions she picked up money for Whitten at Western Union. Counts 14 and 16 are based on evidence of money orders for $4,000 and $6,000 sent to Patti Hickey in February and March of 1980. Counts 10, 11 and 12 are based on money orders in amounts between $2,000 and $6,000 sent directly to Whitten. Count 15 is based on a money order sent to Jerry Gish, an indicted conspirator separately tried. Count 17 is based on a money order sent to John Gaiefsky, a codefendant in this case.

Whitten challenges the sufficiency of the evidence to sustain his convictions on Counts 10 through 17 charging violations of 21 U.S.C. § 843(b). He argues that while there is evidence that money orders were sometimes used by defendants to effect sales of methamphetamine, there is no evidence that these particular money orders sent via wiregram on specified dates constituted payments for illicitly distributed narcotics.

The test of sufficiency of evidence is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). The test is not whether the evidence excludes every hypothesis but that of guilt but whether the trier of fact could reasonably arrive at the conclusion of guilt. *United States* v. *Rojas*, 458 F.2d 1355, 1356 (9th Cir. 1972). The essential elements of the offense with which Whitten is charged in Counts 10 through 17 are: (1) knowing or intentional (2) use of a telegraphic money order (3) to aid or facilitate the distribution of methamphetamine. 21 U.S.C. § 843(b);

United States v. *Barnes*, 681 F.2d 717, 723 (11th Cir. 1982); *United States* v. *Rey*, 641 F.2d 222, 224 n.6 (5th Cir.), *cert. denied*, 454 U.S. 861 (1981).

Testimony by coconspirators provided ample evidence that money orders were often used by Whitten in drug sales, that their use was purposeful, and that it aided the distribution of narcotics. The question is whether the government so limited itself by bringing multiple counts and naming specific dates that it failed to sustain its burden of proving the actual violations charged in the indictment.

In *United States* v. *Murray*, 492 F.2d 178, 186 (9th Cir. 1973), *cert. denied*, 419 U.S. 942 (1974) a conviction under § 843(b) was reversed for insufficient evidence that telephone calls were used to facilitate the importation of narcotics; the only evidence was tape recordings of calls made by persons other than defendants. There was no evidence that defendants customarily placed their orders for narcotics by phone, that they knew these calls were made, or that these particular calls had any connection with their particular narcotics transactions. *Id.* at 186-87. In *United States* v. *Rodriguez*, 546 F.2d 302 (9th Cir. 1976), a conviction under § 843(b) was reversed where the indictment charged but the government failed to prove use of a telephone to facilitate the distribution of cocaine on a specified date. Because the government elected to set forth the date and location of the telephone call, it was obligated to submit evidence to support its charge. *Id.* at 308. *See also United States* v. *Valdivia*, 492 F.2d 199, 207 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974).

This case is distinguishable from *Rodriguez*, in which there was no evidence that the phone call referred to in the indictment was ever made, and from *Murray*, in which there was no evidence linking the phone calls to the defendants charged with the offense. Here, two witnesses testified that on instruction from Whitten, they had personally picked up and cashed money orders at various times and that Whitten used money orders to

effect drug sales. The physical evidence submitted by the government consisted of numerous money orders and money order applications dating from the period of the conspiracy. For each date named in the indictment, there is a corresponding money order for a large sum sent to one of the conspirators or to Patti Hickey, who testified that Whitten asked her to pick up money for him at Western Union on several occasions. The quantity of money orders and the dollar values involved corroborate the testimony that Whitten often used money orders for drug sales. Not only are the sums large, but the money orders were received in quick succession. On March 12, 1980, Whitten was sent one money order for $2,000 and another for $3,000. Less than one week later, on March 17, 1980, he personally received $6,000 via Western Union.

These facts, together with evidence that certain of the individuals named as remitters of the money sent via telegram were generally associated with appellant in narcotics activities, are sufficient to make this question one for the jury. *See United States* v. *Lerma*, 657 F.2d 786, 787-89 (5th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982) (evidence of a large number of calls between a narcotics buyer and defendant who was identified as the seller sufficient to establish a violation of § 843(b)); *United States* v. *Cooper*, 606 F.2d 96, 98 (5th Cir. 1979), *cert. denied*, 444 U.S. 1024 (1980) (testimony that witness sent several money orders and that some of the money used for heroin sufficient to support a conviction on two counts of § 843(b)). Direct testimony linking particular money orders to specific drug transactions would have been preferable. However, we conclude that a rational trier of fact could reasonably have found Whitten guilty of the crimes charged in Counts 10 through 17. The judgment on those counts is affirmed.

B. *Manufacture Count*

Whitten was charged in Count 4 with manufacturing methamphetamine between April 15, 1980, and May 5, 1980.

The government's only relevant evidence showing that Whitten was making the drug on those dates was the statement of Roger Loving, an indicted coconspirator separately tried, that "Kenny was out cooking somewhere" during that period.

The uncorroborated testimony of an accomplice is enough to sustain a conviction, *United States* v. *Johnson*, 454 F.2d 700 (9th Cir. 1972), unless the testimony is "incredible or insubstantial on its face." *Suhl* v. *United States*, 390 F.2d 547, 550 (9th Cir.), *cert. denied*, 391 U.S. 964 (1968). Loving's testimony was not patently incredible. In the context of the evidence at trial, the jurors could reasonably have found on the strength of that testimony that Whitten was guilty of the crime charged beyond a reasonable doubt. *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). The evidence is sufficient, therefore, to sustain his conviction on Count 4, and the judgment is affirmed.

II. Duplicitous Counts

Whitten was convicted of two counts of conspiracy to manufacture and possess a controlled substance in violation of 21 U.S.C. § 846 (Counts 1 and 2). The trial judge sentenced him to five year terms on each conspiracy count to run consecutively to each other, but concurrently with consecutive five year sentences imposed on Counts 3, 4, 5, and 6. Whitten was also convicted of engaging in a continuing criminal enterprise to violate the drug laws under 21 U.S.C. § 848 (Count 23) and sentenced to twenty years, to run concurrently with the sentences imposed on Counts 3, 4, 5 and 6. Relying on the Supreme Court's decision in *Jeffers* v. *United States*, 432 U.S. 137 (1977), Whitten argues that the convictions on the conspiracy counts must be vacated because they are lesser offenses included in the continuing criminal enterprise conviction.

We need not address this question. The twenty year sentence on the continuing criminal enterprise count is concurrent with the four consecutive five year sentences Counts 3, 4, 5 and 6. Because the judgment on those counts is affirmed, we need not

consider the validity of the sentence imposed on Count 23. *United States* v. *Barker*, 675 F.2d 1055, 1059 (9th Cir. 1982); *United States* v. *Valenzuela*, 596 F.2d 1361, 1365 (9th Cir.), *cert. denied*, 444 U.S. 865 (1979); *United States* v. *Walls*, 577 F.2d 690, 699 (9th Cir.), *cert. denied*, 439 U.S. 893 (1978).

III. The Search and Seizure Issues

Whitten attacks his convictions on the ground that they are the product of evidence which was illegally seized in a series of searches and which should have been suppressed.

A. *The Midway Drive Search*

Debra Howard, the key informant in this case, told Drug Enforcement Administration ("DEA") agents that methamphetamine was being manufactured in a cottage at 115 South Midway Drive, Escondido, California. She explained that Whitten and others lived in a large stucco house at the front of the property. On April 15, 1980, ten to twelve DEA agents searched both buildings under the authority of a warrant issued by a federal magistrate. The warrant by its terms authorized the search of both the large stucco house and the cottage at that address.

Only remnants of a laboratory remained in the cottage because Whitten had been alerted to the raid by the arrest of several accomplices in Las Vegas on April 2, 1980. From the large house, the agents seized a large number of photographs and documents including some items conceded to be irrelevant such as jewelry, love letters, marriage papers, and photos not containing evidence of crime. The agents returned the jewelry to its owners. They also seized two locked metal boxes from the bedroom of the large stucco house and returned with them to the office. A thorough investigation of the boxes' contents revealed a large number of irrelevant items. But at the bottom of the boxes the agents found drug paraphernalia including a gram scale and precursor chemicals.

Whitten claims that the search violated the Fourth Amendment because there was no probable cause to search the large stucco house, because the warrant lacked particularity as to the items to be seized, and because the search exceeded the scope of the warrant. Although the manner in which it was conducted was in some respects irregular, we hold that the search was lawful.

Probable cause

Whitten contends that even if the informant's tip justified the search of the cottage, there was no probable cause to search the large stucco house at the front of the property. When a structure is divided into more than one residential unit, or where two residences are located on a single parcel of property, there must be cause to search each unit. *United States* v. *Whitney*, 633 F.2d 902, 907 (9th Cir. 1980), *cert. denied*, 450 U.S. 1004 (1981). But a warrant may authorize a search of an entire street address while reciting probable cause as to only a portion of the premises if they are occupied in common rather than individually, if a multiunit building is used as a single entity, if the defendant was in control of the whole premises, or if the entire premises are suspect. *United States* v. *Gilman*, 684 F.2d 616, 618 (9th Cir. 1982).

The trial judge found that the large house and the cottage were used as a single unit. Although the affidavit in support of the warrant focused on the cottage which was used as a laboratory, the issuing magistrate and the trial judge reasonably concluded that the entire compound was under the control of Whitten. The district court's finding that there were probable cause to search both houses was not clearly erroneous. *United States* v. *O'Connor*, 658 F.2d 688, 690 (9th Cir. 1981).[1]

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[1] We would affirm that finding even if we were to subject the probable cause determination to independent review as a question of law.

Particularity of the Warrant

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects." U.S. Const. amend. IV. No warrants may issue except those which particularly describe the persons and things to be seized. *Id.* Fear of general warrants and of indiscriminate rummaging among personal belongings motivated the adoption of the Fourth Amendment. *Payton* v. *New York*, 445 U.S. 573, 583 (1980).

Whitten contends that the search warrant authorizing in part the seizure of "telephone books, diaries, photographs, utility bills, telephone bills, and any other papers indicating the ownership or occupancy of said residence" was impermissibly broad.

We have upheld warrants authorizing the seizure of items which establish the identity of persons in control of premises. *United States* v. *Marques*, 600 F.2d 742, 751 n.5 (9th Cir. 1979) *cert. denied*, 444 U.S. 1019 (1980) ("articles of personal property tending to establish the identity of persons and control of premises"); *United States* v. *Rettig*, 589 F.2d 418, 421 (9th Cir. 1978) ("indicia of the identity of the residents of said house including, but not limited to, cancelled mail, keys, rent receipts, utility bills, deeds, leases and photographs"); *United States* v. *Honore*, 450 F.2d 31, 33 (9th Cir. 1971), *cert. denied*, 404 U.S. 1048 (1972) ("articles . . . tending to establish the identify [sic] of the persons in control of the premises . . . including but not limited to utility company receipts, rent receipts, cancelled mail envelopes, and keys"). While a warrant authorizing seizure of *any* photographs or diaries might have been unreasonable, here the scope of those words was qualified by the accompanying language "indicating the ownership or occupancy of said residence." Moreover, the issuing magistrate properly took into account the nature of the crime involved in issuing the warrant. *United States* v. *Spearman*, 532 F.2d 132, 133 (9th Cir. 1976). Where multiple defendants were suspected to have utilized the

premises as a laboratory and headquarters for a large-scale illegal drug operation, it was reasonable to authorize the arresting agents to search for evidence showing who occupied and controlled the premises.

Accordingly, appellant's attack on the breadth of the warrant is unfounded.

Scope of the Search

A search must be confined to the terms and limitations of the warrant authorizing it. *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 394 n.7 (1971). Searches which require an examination of books, papers and personal effects in a suspect's home are "an especially sensitive matter calling for careful exercise of the magistrate's judicial supervision and control." *United States* v. *Rettig*, 589 F.2d 418, 423 (9th Cir. 1978). Whitten contends that the agents who searched 115 South Midway Drive rummaged through the belongings of its residents and seized materials not described in the warrant.

The facts surrounding the execution of the warrant are these. Austin, the agent in charge of the South Midway search, and the ten to twelve agents assigned to the search attended a thirty minute pre-search briefing. A deployment strategy was adopted and the agents were instructed to take only what was authorized by the warrant. They did not read the warrant itself. Agent Austin testified that he understood that he was empowered to seize not only evidence as to who owned the house, who lived there, and who received mail there, but also every piece of paper with a name on it and every photo with a person in it.

The agents took more than a thousand photographs from the house. Agent Austin explained that he was trying to be selective but did not have time to go through all the photos; he therefore took the lot intending to look through them more thoroughly later. Two metal strong boxes were taken from the bedroom of

the stucco house and their contents examined at the DEA offices. The boxes contained love letters, jewelry, marriage, divorce, and custody papers, a billing statement from a lawyer, a probation report, and form printed checks. Underneath these items, the agents found drug paraphernalia and precursor chemicals.

There is a question whether the agents conducting the search were adequately briefed on the terms of the warrant and whether they respected the limitation barring seizure of items not mentioned in the warrant. *See United States* v. *Heldt*, 668 F.2d 1238, 1254-69 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1971(1982). Officers conducting a search should read the warrant or otherwise become fully familiar with its contents, and should carefully review the lists of items which may be seized. A better understanding of the warrant by the agents who searched 115 South Midway Drive on April 15, 1980, might have avoided some of the problems which have occupied the parties and the courts in this lengthy litigation.

We disapprove the removal by the agents from the house of large quantities of papers, photographs, and other items which *might* have been relevant to who lived or worked there. The Midway search points up the practical difficulties in executing a warrant for "indicia of ownership and control of the premises." Although it may be intrusive for police officers to remain in a home and make a careful examination of items to determine whether they fall within the description of the warrant, it is equally intrusive for them to carry off papers and personal effects indiscriminately for later review. *Cf. United States* v. *Heldt*, 668 F.2d at 1267. Wholesale adoption of the latter practice would be "to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant." *Stanley* v. *Georgia*, 394 U.S. 557, 572 (1969)(Stewart, J., concurring).

Although the search was not scrupulously confined to the terms of the warrant, it does not follow necessarily that all of the evidence seized must be suppressed. *United States* v. *Daniels*, 549 F.2d 665, 668 (9th Cir. 1977); *Heldt*, 688 F.2d at 1259. We agree with the approach taken by the Court of Appeals for the District of Columbia in *Heldt*:

> Absent . . . flagrant disregard [for the terms of the warrant], the appropriate rule seems to be that where officers seize some items outside the scope of a valid warrant, this by itself will not affect the admissibility of other contemporaneously seized items which do fall within the warrant.

688 F.2d at 1259.

That reasoning should be applied here. All of the items seized at Midway Road and admitted into evidence were things which the DEA agents were authorized to take under the warrant. The trial judge ordered the return of nonrelevant items. The search did not reflect flagrant disregard for the terms of the warrant. For these reasons, the motions to suppress were properly denied.

B. *The Silva Road Search*

On August 18, 1981, DEA agents obtained a warrant authorizing them to search for and arrest Kenneth Whitten at 9898 Silva Road in El Cajon, California. They did not find Whitten at Silva Road but remained on the premises for a period of time — between thirty and ninety minutes.[2] While they were in the house, a telephone answering machine in the living room received, recorded and broadcast a call to Whitten from Susanne Hickey, an indicted coconspirator tried separately. After listening to the incoming call which was automatically recorded and played aloud, the agents rewound the tape in order to hear the message a second time. Inadvertently they rewound it past the

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[2] The testimony of the various agents who searched the Silva Road house is in conflict on this point, but neither the government nor defendants pursued it at trial.

Hickey call to the beginning of the tape. When they played it back, they overheard a recording of a call from a woman who had recently rented a house to Whitten. The agents called the number which she had left and learned that the rented house was on Lyons Valley Road in Alpine. A number of agents went to the Alpine address and there arrested Whitten.

While present at Silva Road, the agents also seized an orange notebook which lay closed on a coffee table in the living room and a yellow tablet found on top of the refrigerator open to the second or third page. The notebook and tablet were both introduced into evidence. Whitten contends that his Fourth Amendment rights were violated when the agents played back the recorded messages on the answering machine and when they seized the orange notebook and the yellow tablet.

Tape Recordings

The trial judge denied the motion to suppress the recorded messages, finding that there was no reasonable expectation of privacy in the contents of any of the communications because the first was broadcast aloud and the others were inadvertently overheard. The motion to suppress was properly denied.

The occupants of Silva Road had no legitimate expectation of privacy in the contents of the Hickey call because the speaker on the recording machine had been turned on, making incoming calls clearly audible to any person present in the room where the answering device was located. *Katz* v. *United States*, 389 U.S. 347 (1967). *See also United States* v. *Kenny*, 645 F.2d 1323, 1339 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981), (phone conversation recorded by party to conversation acting as government informant); *United States* v. *Ortiz*, 603 F.2d 76, 79 (9th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980) (inside of gas station visible from a public place); *United States* v. *Coplen*, 541 F.2d 211, 214-15 (9th Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977) (interior of airplane visible from parking lot of airport); *United States* v. *Fisch*, 474 F.2d 1071, 1076-77 (9th Cir.), *cert.*

denied, 412 U.S. 921 (1973) (conversation audible in adjoining motel room). Here, as the trial judge found, the volume on the device was turned up so high that it could be heard outside as well as inside the house.

A different question is presented by the contents of the earlier recorded message which was not overheard by the agents until the tape was rewound and replayed. The government contends that even if appellant did have a legitimate expectation of privacy in the contents of the earlier call, the agents came across it in "plain view" when, seeking to verify the contents of the Hickey message, they accidentally rewound the tape past the earlier message.

Under the "plain view" exception to the warrant requirement, an officer who is lawfully present at a location may seize anything which immediately appears to be evidence and whose discovery is inadvertent. *Washington* v. *Chrisman*, 455 U.S. 1, 5-6 (1982); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Application of the "plain view" exception to this case raises two issues: first, whether at the time the agents came across the recorded message they were lawfully on the premises, and, second, assuming their lawful presence, whether they came across it inadvertently.

With respect to the first issue, appellant does not dispute that the initial entry into and search of the Silva Road house was lawful under the *Prescott* warrant. *United States* v. *Prescott*, 581 F.2d 1343 (9th Cir. 1978). He argues for the first time on appeal, however, that the "plain view" exception cannot be invoked because the agents, having failed to find Whitten, were no longer lawfully present when they discovered the message on the tape. Appellant did not raise this issue in the motion to suppress or the supporting memorandum filed in the trial court. The only reference to it is found in a passing comment by defense counsel at the end of his oral argument on the motion

to suppress; counsel there described it as an "extraneous" issue.[3] The trial court was not asked to and did not make a finding on it.

As a general rule, an issue not presented to the trial court cannot be raised for the first time on appeal. *People of the Territory of Guam* v. *Okada*, 694 F.2d 565, 570 n.8 (9th Cir. 1982); *United States* v. *Patrin*, 575 F.2d 708, 712 (9th Cir. 1978) (citing *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976)). Several policies underlie this rule. It would be unfair to surprise litigants on appeal by final decision of an issue on which they had no opportunity to introduce evidence. *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941); *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). Judicial economy and sound judicial administration require that issues critical to the conduct of the trial, such as grounds for suppressing evidence, be presented initially to the trial judge for decision.[4]

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[3] Counsel's remarks on this issue were as follows:

> I don't believe the *Prescott* warrant will allow you, or certainly not an arrest warrant will allow you to stay there, because both of them are premised, and necessarily, Your Honor, on the assumption that he's there now, and if you don't have reasonable cause to believe he's there now, you can't enter even with a *Prescott* warrant.
>
> Now, when it turns out that you were wrong, you have to leave, you can maintain surveillance, and if you see him coming in, go get another *Prescott* warrant, no problem with that, or in a case where you're entering a person's residence if that's the person you're seeking to arrest, no problem with entering, time and again, and I would suppose pursuant to that arrest warrant. But a *Prescott* warrant doesn't give you a right to camp out in a man's house, and that's what constitutes an unreasonable extension.
>
> So we're not even sure they were legitimately on the premises at the time they heard the tape.
>
> . But all of those issues are extraneous, and in the interest of fairness, I mean to give the government equal time to respond.
>
> (R.T. 821-22)

[4] *See* Wainwright v. Sykes, 433 U.S. 72, 88-90 (1977), where the Court, in enforcing a contemporaneous-objection rule, stressed its importance in permitting the trial judge to make necessary factual

Exceptions to the general rule are recognized where a new theory or issue arises while an appeal is pending because of a change in the law, *Hormel*, 312 U.S. at 557-58; *Singleton*, 428 U.S. at 120-21, or where the issue conceded or neglected below is purely one of law and does not affect or rely on the factual record developed by the parties, *Patrin*, 575 F.2d at 112; *United States* v. *Gabriel*, 625 F.2d 830, 832 (9th Cir.), *cert. denied*, 449 U.S. 1113 (1980), or where plain error has occurred and injustice might otherwise result, *Okada*, 694 F.2d at 570 n.8; *United States* v. *Fong*, 529 F.2d 55 (9th Cir. 1975).

None of these exceptions applies here. Appellant's argument is not based on new law. Nor does resolution of the issue in the context of this case present a pure question of law. Factual questions such as the precise length of time the agents remained on the premises, the likelihood that the person specified in the warrant might return, and other factors tending to support the reasonableness of the agents' continued presence on the premises under the circumstances might bear decisively on the determination of the legal question whether the Fourth Amendment was violated. Finally, given the strength of the evidence against appellant in this case, and the fact that the exclusionary rule is a judicially created remedy to effectuate rights secured by the Fourth Amendment and not a constitutional imperative, *Stone* v. *Powell*, 428 U.S. 465, 482-83 (1976), no fundamental injustice will result from our declining to decide a question not presented to the trial court.

With respect to the second issue, appellant argues that the contents of the earlier recorded messages were not in plain view because they could not be revealed without the purposeful use of the answering machine. Appellant relies principally on *Walter* v. *United States*, 447 U.S. 649, 657 (1980) and *State* v. *Turkal*,

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determinations, contributing to finality in criminal litigation, and conserving social resources. *Cf.* Partenweederei, MS Belgrano v. Weigel, 313 F.2d 423, 425 (9th Cir. 1963).

599 P.2d 1045 (N.M. 1979) (cited with approval in *United States* v. *Wright*, 667 F.2d 793, 799 n.6 (9th Cir. 1982)). The cases do not support so broad a proposition. In each of them, agents lawfully came into possession of tapes or films whose contents they listened to or viewed without first obtaining a warrant. Their purpose was clearly exploratory. It was this deliberate exploration, not the use of a machine, that made the "plain view" exception inapplicable. *See Stanley* v. *Georgia*, 394 U.S. 557, 571-72 (1969) (Stewart, J., concurring); *Coolidge* v. *New Hampshire*, 403 U.S. at 466-67. The district judge specifically found that the complete rewinding of the tape and the hearing of the earlier message were inadvertent. That finding was not clearly erroneous.

The Orange Notebook and Yellow Pad

The government seeks to justify the seizure of the orange notebook and the yellow pad on the ground that they are evidence of criminal activity found in plain view. The "plain view" exception applies "only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Coolidge* v. *New Hampshire*, 403 U.S. at 466. "To assure that warranted searches do not result in 'exploratory rummaging' the plain view doctrine limits the right of seizure to items, the incriminating nature of which is immediately apparent to the searching officer." *United States* v. *Wright*, 667 F.2d at 797.

Applying the plain view rule as elaborated in the cases to the situation here, the seizure of the orange notebook was impermissible. There was nothing facially incriminating about the closed notebook from which the DEA agents could reasonably have concluded that it might contain evidence of crime. *See State* v. *Shinault*, 120 Ariz. 213, 584 P.2d 1204 (Ariz. App. 1978).

The yellow pad, however, was open to the second or third page when discovered by one of the agents. That page read: "Move cars to new place. Calls: Sammy Roscoe; 10 [gallons]. Big. Glass beads, 60 degree adaptor." In the context of this investigation into large-scale methamphetamine manufacture and distribution, the incriminating nature of this evidence was readily apparent to the agents.

While the admission into evidence of the orange notebook was error, the error was harmless and does not mandate reversal. *Chapman* v. *California*, 386 U.S. 18, 24 (1967). It was admitted near the end of the trial without any discussion of its contents; indeed the trial transcript does not disclose its relevance or what information it contained. In light of the overwhelming evidence against Whitten, its admission was harmless beyond a reasonable doubt.

C. *The Lyons Valley Road Search*

On the basis of the information from the tape recorded message at Silva Road, the DEA agents proceeded to the Lyons Valley Road address in the town of Alpine and arrested Whitten on a warrant as he emerged from the residence on that property. Parked in the driveway were two motorcycles and a yellow sport-scar. After arresting Whitten, the agents entered the house and made a cursory investigation finding methamphetamine on a table in the living room and on paper plates in the kitchen and a handgun on the fireplace mantle. Agent Jones approached a shed adjoining the house and detected strong chemical odors emanating from it, leading him to believe that the shed contained a drug laboratory. His suspicions were confirmed upon entry when he discovered a methamphetamine laboratory in full operation. Because the area was remote, the agents could not make radio or telephone contact with their fellow agents. After securing the house and shed, one of the agents obtained a telephone warrant for both buildings. Using the warrant, the agents conducted a more complete search of each building. They photographed the

rooms and discovered papers such as invoices and car registrations linking Whitten and appellant Richard Shimel to the locations.

The evidence against Whitten seized from the Lyons Valley Road residence is of three kinds: (1) methamphetamine powder and the drug laboratory equipment, (2) photographs of the interior of the two buildings, and (3) various documents from a lockbox and from other locations inside the house.

Whitten makes three contentions with respect to this search: first, that the initial warrantless entry into the house and shed following his arrest was without legal justification; second, that the telephone warrant upon which a more thorough search of the premises was based was defective because overbroad; third, that the agents failed to comply with the procedural requirements of Rule 41(c)(2) of the Federal Rules of Criminal Procedure in applying for the warrant.[5]

Warrantless Entry

The district court upheld the post-arrest entry, reasoning that the agents properly conducted a protective sweep of the entire premises following Whitten's arrest. The trial judge cited a number of reasons for the agents' belief that persons other than Whitten might be present and dangerous. Three vehicles, not one, were parked in the driveway. The area was remote and a number of codefendants were unaccounted for. The agents could not make radio or telephone contact with other DEA agents. Members of the drug ring were believed to be armed and in the general area. And there was evidence suggesting an operating illegal laboratory and a danger of possible explosion.

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[5] Because we hold that the telephone warrant was overbroad, we do not reach the questions raised by appellant concerning the procedure used to obtain the warrant and the requirements of Rule 41(c) of the Federal Rules of Criminal Procedure.

A protective sweep of a building without a warrant may be justified by exigent circumstances if the officers reasonably believe that there might be other persons on the premises who could pose a danger to them. *United States* v. *Gardner*, 627 F.2d 906, 909-10 (9th Cir. 1980). However to excuse this departure from the usual requirement of a warrant, the executing officers must be able to "point to specific and articulable facts" supporting their belief that other dangerous persons may be in the building or elsewhere on the premises. *United States* v. *Dugger*, 603 F.2d 97, 99 (9th Cir. 1979) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968)). The circumstances found by the trial judge provide ample justification for the protective sweep of both the residence and the laboratory at the Alpine location.

With respect to the shed, additional exigency was created by the agents' reasonable belief, under the circumstances, that a methamphetamine laboratory was in operation. The trial judge specifically found that the risk of explosion presented an exigent circumstance that would have justified an immediate warrantless search. His findings are supported by the record and by the law. *See United States* v. *Williams*, 630 F.2d 1322, 1326-27 (9th Cir.), *cert. denied*, 101 S. Ct. 197 (1980) (risk of explosion from PCP lab in mobile home).

The Telephone Warrant

The Fourth Amendment expressly provides that no warrants may issue except those "particularly describing the place to be searched, and the persons and things to be seized." U.S. Const. amend. IV. Appellant Whitten contends that the telephone warrant subsequently issued which authorized the agents to search for "methamphetamine and evidence of narcotics trafficking" was overbroad.

This language of the warrant did not enable the officers executing it to confine their search to particular items whose seizure was authorized by the issuing magistrate. In *United States* v. *Crozier*, 674 F.2d 1293 (9th Cir. 1982), this court held

invalid a warrant which permitted the seizure of "material evidence of violation of 28 U.S.C. § 841, 846. Manufacture and possession with intent to distribute amphetamine and conspiracy." *Id.* at 1299. The warrant in this case suffers from the same defect of overbreadth. The term "evidence of narcotics trafficking" did not adequately confine the discretion of the agents executing the warrant. *Andresen* v. *Maryland*, 427 U.S. 463, 480 (1976).

While the telephone warrant which authorized the search of Lyons Valley Road was overbroad, its invalidity affects only a few items. Of the evidence seized there and used against Whitten, only the miscellaneous papers linking him to the location were the product of the warrant search. The methamphetamine discovered in the house and the drug laboratory discovered in the shed were in plain view when the officers conducted the protective sweep. The trial judge properly denied their suppression. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). The photographs of the interior were also properly admitted since they represent only what was plainly visible to the agents in the course of their initial lawful sweep of the premises.

The papers tying Whitten to the location — a motorcycle service order made out to Whitten and several automobile registrations in his name — were not in plain view and were improperly admitted. In the light of all the evidence presented against Whitten in the case, however, the admission of these papers was harmless beyond a reasonable doubt and is not a basis for reversing his convictions. *Chapman* v. *California*, 386 U.S. 18, 24 (1967); *United States* v. *Armstrong*, 654 F.2d 1328, 1336 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982).

GAIEFSKY'S APPEAL

John Gaiefsky was arrested in the doorway of his room in the Las Vegas Hilton Hotel on the morning of April 3, 1981. The testimony at trial of the arresting DEA agent and one of the arresting police officers establishes that when Gaiefsky answered

the door, he was immediately arrested and handcuffed and placed in a chair inside the room. The agent and officers then searched the room for a gun which their informant had told them Gaiefsky carried. The gun was found under a pillow on the bed. Gaiefsky, who was in his underwear, then asked to get dressed before being taken to jail. The officers handed him his clothes. At some time while they were in the room, one of the arresting officers observed a bottle containing a white powder on the table next to the chair where Gaiefsky was sitting. The powder, but not the gun, was received into evidence at the trial.

Gaiefsky moved to suppress the evidence seized in his room on three grounds. The first two are without merit. He argues that there was no probable cause for his arrest because the information given by Debra Howard was not sufficiently reliable to meet the test of *Aguilar* v. *Texas*, 378 U.S. 108 (1964). That information was detailed, however, and was corroborated by police investigation. *United States* v. *Moreno*, 569 F.2d 1049, 1052 (9th Cir.), *cert. denied*, 435 U.S. 972 (1978). The trial court's finding of probable cause is amply supported. Gaiefsky also argues that his arrest violated the rule of *Payton* v. *New York*, 445 U.S. 573 (1980), barring warrantless entry to make an arrest. A doorway, however, unlike the interior of a hotel room, is a public place. *United States* v. *Santana*, 427 U.S. 38 (1976). No warrant was therefore required to make the arrest.

Gaiefsky's principal argument is that the warrantless entry into his room violated the Fourth Amendment. The trial court denied the motion to suppress, finding exigent circumstances because "there was a danger of destruction of evidence, flight and increased danger to the arresting officers."

"[A] search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable unless the police can show that it falls within one of the carefully defined set of exceptions based on the premise of 'exigent circumstances.'"

Coolidge v. *New Hampshire*, 403 U.S. 443, 474-75 (1971); *Payton* v. *New York*, 445 U.S. 573, 586 n.25 (1980).

The court below found exigent circumstances based upon danger of destruction of evidence, flight, and danger to the arresting officers. There was no evidence of imminent danger of destruction of evidence in the room; one of the officers testifed that he had no information that Gaiefsky was in the process of destroying evidence and did not know whether anyone else was in the room. There was no evidence of risk of flight or danger to the officers; Gaiefsky had been handcuffed immediately on his arrest and no one testified that the officers suspected the presence of anyone associated with Gaiefsky in the vicinity.

An arrest on probable cause outside the arrestee's premises does not "provide its own 'exigent circumstance' so as to justify a warrantless search of the arrestee's house." *Vale* v. *Louisiana*, 399 U.S. 30, 35 (1970). The burden is on the government to establish the availability of an exception to the warrant requirement. *United States* v. *Jeffers*, 342 U.S. 48, 51 (1951). Inasmuch as evidence of exigent circumstances is totally lacking from the record, the finding to that extent is clearly erroneous.

Nor can the entry into Gaiefsky's room be justified as a search incident to arrest. At the time of his arrest in the doorway, Gaiefsky was handcuffed and nothing in the room was within his reach. The rule of *Chimel* v. *California*, 395 U.S. 752 (1969), "does not permit the arresting officers to lead the accused from place to place and use his presence in each location to justify a 'search incident to the arrest.'" *United States* v. *Mason*, 523 F.2d 1122, 1126 (D.C. Cir. 1975). If a search of a house is to be upheld as incident to an arrest, that arrest must take place inside the house. *Vale* v. *Louisiana*, 399 U.S. at 33-34.[6]

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[6] We are not inclined to follow *United States* v. *Burns*, 624 F.2d 95 (10th Cir.), *cert. denied sub nom. Reynolds* v. *United States*, 449 U.S. 954 (1980), upholding a search using a drug-detecting police

Finally, there is no evidence from which one could infer that Gaiefsky consented to the officers' entry into the room. Although the testimony is not wholly clear, it appears that Gaiefsky did not ask to be allowed to dress until after the officers had taken him into the room immediately upon his arrest and without his consent. Absent such a "specific request or consent," the officers' entry was unlawful. *United States* v. *Anthon*, 648 F.2d 669, 675 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982) (suspect arrested in hotel hallway wearing a bathing suit and returned to his room). *See also United States* v. *Kinney*, 638 F.2d 941, 945 (6th Cir.), *cert. denied*, 452 U.S. 918 (1981); *Giacalone* v. *Lucas*, 445 F.2d 1238, 1247 (6th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972) ("Appellant's decision to walk from the dining room to his bedroom in order to change into more appropriate clothing was voluntary and consensual.").

The rule governing consent searches is clear. "[W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." *Florida* v. *Royer*, 51 U.S.L.W. 4293, 4294 (U.S. March 23, 1983). The government has failed to sustain that burden.

The drugs seized in the room were relevant evidence supporting the charges against Gaiefsky in Counts 2 and 6. The admission of that evidence was not harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, 24 (1967). The conviction on those counts must therefore be reversed.

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dog of a motel room whose occupant had been arrested in the doorway. The court stated that "[g]enerally, a limited, warrantless search of a motel room incident to the lawful arrest of its occupants is permissible. . . . This principle applies where, as here, the arrest occurs at an entrance way." *Id.* at 101. This statement appears to us to be inconsistent with *Vale* and with *Chimel*, which authorizes a search only of the area within an arrestee's "immediate control." *Chimel*, 395 U.S. at 763.

SHIMEL'S APPEAL

Appellant Shimel was convicted of two counts of conspiracy to manufacture and to distribute methamphetamine (Counts 1 and 2) and of two additional counts of manufacture and of possession with intent to distribute the drug on August 18, 1981 (Counts 20 and 21). He was sentenced to concurrent five-year terms on the conspiracy counts and to five-year terms on the two substantive offenses to run concurrently with each other, but consecutive to the conspiracy sentences.

On appeal, Shimel challenges the legality of the warrantless rewinding of the tape machine at Silva Road which led to the discovery of evidence linking him to the drug operations at Lyons Valley Road, Alpine. As discussed above, the inadvertent discovery of the message on the recording machine at Silva Road did not, in the circumstances, violate appellant's rights under the Fourth Amendment. He also contests the Alpine search, the admission of a hearsay statement, and the sufficiency of the evidence to support his convictions.

Factual Summary

Using false names, Shimel and Whitten negotiated the rental of the Lyons Valley Road premises in Alpine. Shimel gave the owner the first and last month's rent plus a security deposit. In the course of the search conducted under the authority of the telephone warrant which we have found to be overbroad, the DEA agents found the following evidence linking Shimel to drug manufacture at Lyons Valley Road: an invoice made out to Shimel discovered in a steel floor safe and a piece of paper with his signature on it in a pile of clothes on the back porch of the house. He was charged in Counts 20 and 21 with manufacture of methamphetamine and with possession with intent to distribute the drug on August 18, 1981, the date of the Alpine search. Had the papers seized from the Lyons Valley house been excluded, the only remaining evidence tying him with the Alpine lab would

have been the testimony of the owner of the property that she rented it to Shimel and took cash from him for the deposits.

Search and Seizure

Where illegally seized evidence is introduced at trial, reversal is mandated unless the prosecution establishes that it was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, 24 (1967); *Bumper* v. *North Carolina*, 391 U.S. 543, 550 (1968). Because of the dearth of other evidence linking Shimel to actual drug manufacture on August 18, 1981, the admission into evidence of papers connecting him with activities at the Alpine house and laboratory was clearly prejudicial. Accordingly, his convictions on Counts 20 and 21 must be reversed. As discussed in the following paragraphs, however, there is ample evidence to support his conspiracy convictions under the *Chapman* test.

Sufficiency of the Evidence

There remains to be considered appellant's convictions on the two conspiracy counts. Shimel charges that the evidence was insufficient to support these convictions. The test for sufficiency of evidence is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). The evidence on the conspiracy charges consisted of a photograph seized at Midway Road showing Shimel holding a bag of white powder; testimony by Roger Loving, an indicted coconspirator, that Whitten told him that Shimel worked for Whitten in Florida and Houston and had "cooked" for him at the Houston lab; a money order from Pat Sharp to Shimel for $1,969 dated March 23, 1981; Shimel's fingerprint lifted from glassware found in Whitten's Houston lab; and testimony that Shimel with Whitten rented the Lyons Valley Road premises under false names.

Loving's statements concerning what Whitten had told him about Shimel's involvement in the drug ring were properly admitted under Rule 801(d)(2)(E) of the Federal Rules of Evidence as statements of a coconspirator made during and in furtherance of the conspiracy. Whitten made the statements to Loving some eight or nine months after the two had met. Loving's business had been doing badly and he was in debt. After meeting Whitten, he started helping him procure and sell drugs, as well as selling them on his own. His principal contacts with Whitten in the first months of the relationship were through Loving's daughter. Loving testified that he met Shimel while visting his daughter, and that Whitten told Loving that Shimel started out with Whitten in Florida, had "cooked" for him in Houston, and had worked for him "all this time."

For a statement to qualify as non-hearsay under the coconspirator provision of the Federal Rules of Evidence, the trial judge must determine that there is sufficient evidence to support an inference that the statement was made in furtherance of the conspiracy. *United States* v. *Eubanks*, 591 F.2d 513, 519 (9th Cir. 1979). Mere conversations or casual admissions of guilt are not admissible as declarations to advance the objectives of the conspiracy. *United States* v. *Moore*, 522 F.2d 1068, 1077 (9th Cir.), *cert. denied*, 423 U.S. 1049 (1976). On the record before him, the trial judge could reasonably have concluded that Whitten's statements to Loving were intended, in part, to assure Loving's continued participation in Whitten's drug activities. As such, they were properly admitted under Rule 801(d)(2)(E). *United States* v. *Anderson*, 642 F.2d 281, 285 (9th Cir. 1981); *United States* v. *Eubanks*, 591 F.2d 513, 520 (9th Cir. 1979); *United States* v. *Jackson*, 549 F.2d 517, 533-34 (8th Cir.), *cert. denied*, 430 U.S. 985 (1977); *United States* v. *Dorn*, 561 F.2d 1252, 1256 (7th Cir. 1977).[7]

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[7] Appellant also charged that the admission of Loving's statements violated the Confrontation Clause of the federal constitution. That

Loving's statements together with documentary and other evidence linking Shimel to the Whitten conspiracy adequately support the jury's verdict on Count 1 and 2. The jurors could reasonably have concluded from this evidence that Shimel was guilty of the conspiracies charged beyond a reasonable doubt. *Jackson* v. *Virginia*, 443 U.S. 307, 317 (1979). Accordingly, his conviction on Counts 1 and 2 are affirmed.

GISH'S APPEAL

Appellant Gish was convicted of conspiracy to possess methamphetamine with intent to distribute in violation of 21 U.S.C. § 846 (Count 2). The trial judge sentenced him to three years. Gish challenges the denial of an evidentiary hearing to test the contents of an affidavit supporting a search in Lakeway, Texas, which yielded evidence implicating him in the Whitten drug ring. He also claims error in the admission of hearsay evidence during the suppression hearings and in the instructions given the jury on conspiracy.

Denial of an Evidentiary Hearing

At a pretrial hearing Gish challenged the truthfulnes of a sworn statement used by the Texas police to procure a search warrant. Gish claims that the police deliberately falsified the affidavit accompanying the warrant and that they invented the informant who provided the tip on which the warrant was based. The trial judge denied a request to hold an evidentiary hearing on the issue of veracity.

A defendant is entitled to an evidentiary hearing to test the contents of an affidavit supporting a warrant if he shows, by a preponderance of the evidence, that the affiant deliberately or recklessly made a false statement necessary to establish probable cause. *Franks* v. *Delaware*, 438 U.S. 154 (1978). The officer

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issue was not preserved by a proper objection at trial and we do not consider it here. *See United States* v. *Traylor*, 656 F.2d 1326, 1333 & n. 6 (9th Cir. 1981).

who prepared the affidavit testified that he had a confidential informant who had been inside the location searched and seen methamphetamine. Gish failed to make a preliminary showing that the officer deliberately or recklessly falsified his affidavit. A *Franks* hearing was properly denied by the trial judge. *United States* v. *Young Buffalo*, 591 F.2d 506, 510 (9th Cir.), *cert. denied*, 441 U.S. 950 (1979).

Improper Jury Instructions

Gish claims that the jury instructions on conspiracy were confusing and that the judge commented on the evidence. An appellate court must review the instructions as a whole and defer to a trial judge's language unless he abused his discretion. *United States* v. *Abushi*, 682 F.2d 1289, 1299 (9th Cir. 1982). The instructions on conspiracy, while lengthy, did not misstate the law and the jury was permitted to refer to a written copy of the instructions during its deliberations. Appellant's claim of prejudice is without merit.

Admission of Hearsay Evidence at Pretrial

Gish claims that the district judge improperly permitted hearsay evidence during the extensive pretrial suppression hearings. He also asserts that pretrial admission of evidence that guns were present at a number of locations searched prejudiced him because the indictment contained no weapons charges.

The trial judge is not bound by the hearsay rule in making preliminary determinations such as whether evidence is admissible at trial. Fed. R. Evid. 104(a); *United States* v. *Matlock*, 415 U.S. 164, 172-74 (1974). And the district judge properly considered evidence that guns were found at a number of the sites searched. The presence of guns was relevant to determining the legality of those searches. The comments of the trial judge cited by appellant regarding the numerous guns involved in the case were made out of the hearing of the jury and thus could not

have prejudiced the triers of fact. Appellant's conviction is therefore affirmed.

The Court has considered other claims made by appellants in this case and finds them to be without merit. The convictions are affirmed in part and reversed in part in accordance with this opinion.

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KENNETH JOE WHITTEN,
RICHARD LAWRENCE SHIMEL,
Defendants-Appellants.

CA Nos. 82-1315
82-1303
DC No. 81-1049-T
(Southern California)
(Filed September 30, 1983)

ORDER

Before: FARRIS and ALARCON, Circuit Judges, and SCHWARZER,* District Judge.

The panel as constituted in the above case has voted to deny the petitions for rehearing filed by appellants Whitten and Shimel. Judge Farris and Judge Alarcon have voted to reject the suggestions for rehearing en banc and Judge Schwarzer would so recommend.

The full court has been advised of the suggestions for en banc hearings and no judge of the court has requested a vote on them. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

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* The Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

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No. 83-864

In the Supreme Court of the United States

OCTOBER TERM, 1983

KENNETH JOE WHITTEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether all items seized pursuant to a valid search warrant should have been suppressed because the officers conducting the search also seized items not specified in the warrant.

2. Whether petitioner's Fourth Amendment rights were violated when officers, having already lawfully heard the contents of a telephone message as it was played aloud by a telephone answering machine, rewound the tape recording to hear the message again and inadvertently heard another previously recorded message as well.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A30) is reported at 706 F.2d 1000.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1983. A petition for rehearing was denied on September 30, 1983 (Pet. App. A31). The petition for a writ of certiorari was filed on November 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner and 23 co-defendants were charged in a 24-count indictment in the Southern District of California with manufacturing and distributing methamphetamine. The case against petitioner and three other co-defendants was severed from the others, and after a jury trial, all four were convicted. Petitioner was convicted on one count of conspiracy to manufacture methamphetamine, in violation of

21 U.S.C. 841(a)(1) and 846 (Count 1), one count of conspiracy to possess methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846 (Count 2), three counts of manufacturing methamphetamine, in violation of 21 U.S.C. 841(a)(1) (Counts 3, 4, and 20), three counts of possession of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 5, 6, and 21), ten counts of using a communication facility to facilitate the distribution of methamphetamine, in violation of 21 U.S.C. 843(b) and 18 U.S.C. 2 (Counts 7-17), one count of interstate travel to promote a business enterprise involving controlled substances, in violation of 18 U.S.C. 1952(a)(3) (Count 18), and one count of conducting a continuing criminal enterprise, in violation of 21 U.S.C. 848(b)(2) (Count 23).[1] He was sentenced to a total of 20 years' imprisonment and was fined $200,000.[2] The court of appeals affirmed (Pet. App. A1-A30).

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[1]Co-defendants John Gaiefsky, Jack Gish, and Richard Shimel were also charged in Counts 1 and 2 as well as in various of the substantive counts. The district court granted a judgment of acquittal at the close of the government's case as to defendant Gish on Count 1 and as to petitioner on Count 9. The court of appeals affirmed the convictions of Gaiefsky on Counts 2 and 6 (Pet. App. A21-A24). The court of appeals affirmed the convictions of Shimel on Counts 1 and 2 and reversed his convictions on Counts 20 and 21 (Pet. App. A25-A28). The court also affirmed Gish's conviction on Count 2 (Pet. App. A28-A30). None of these three co-defendants has joined in this petition.

[2]The sentences were arranged as follows: five years each on Counts 1 and 2, to run consecutively to each other and concurrently with consecutive five-year terms on each of Counts 3, 4, 5, and 6; four years on each of Counts 7, 8, and 10-17, the sentences on Counts 7, 8, 10, 11, and 12 to run consecutively to each other, and concurrently with those on Counts 3, 4, 5, and 6, and the sentences on Counts 13-17 to run consecutively to each other, and concurrently with those on Counts 3, 4, 5, and 6; five years on each of Counts 18, 20, and 21, the sentences to run consecutively to each other and concurrently with those on Counts 3, 4, 5, and 6; and 20 years on Count 23, to run concurrently with the sentences imposed on Counts 3, 4, 5, and 6. The fines imposed were $30,000 on each of Counts 7, 8, 10, 11, 12, and 13, and $20,000 on Count 14.

1. The evidence at trial established that petitioner directed an extensive operation of manufacturing and distributing methamphetamine. The business included the establishment and operation of laboratories in Texas and California and a marketing system in a number of states (Pet. App. 2a).

In February 1980, petitioner flew to California and obtained permission to set up a methamphetamine laboratory in a house at 115 Midway Drive in Escondido, agreeing to pay the resident a fee for each batch of the drug that was produced (R.T. 1406, 1408).[3] Petitioner then directed Roger Loving to drive to California with chemicals to set up the laboratory in Escondido (R.T. 1207, 1211-1214). Once the laboratory was established in Escondido, petitioner began sending large amounts of methamphetamine from there to various distributors in Texas, receiving payment by means of Western Union money orders (R.T. 1226-1227).

In March 1980, three of petitioner's distributors, Roger Loving, co-defendant John Gaiefsky, and Debra Howard, went to Las Vegas with a quantity of methamphetamine, which Debra Howard sold. She returned to San Diego and delivered the money to petitioner (R.T. 1045-1047). On April 1 she sold more of the drug in Las Vegas and called petitioner in San Diego to make arrangements for more methamphetamine to be delivered to her there (R.T. 1051-1052). That evening Howard was arrested on an unrelated charge, following which she agreed to cooperate with the authorities (R.T. 1053-1055). Based on information she provided, police in California and Texas made a number of arrests and searched several buildings (Pet. App. A2).

One of these searches occurred at the 115 South Midway Drive address in Escondido, California. On April 15, 1980, several Drug Enforcement Administration (DEA) agents

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[3] "R.T." refers to the reporter's transcript of the trial. These references are taken from the government's brief in the court of appeals.

searched both a cottage and a large stucco house on the property, pursuant to a federal search warrant. The warrant authorized in part the seizure of "telephone books, diaries, photographs, utility bills, telephone bills, and any other papers indicating the ownership or occupancy of said residence." Pet. App. A7, A9.

When the police arrived at the cottage, only remnants of a laboratory remained there because petitioner had been alerted to the raid. The agents seized from the house a large number of photographs and documents, which included some items that were irrelevant, such as jewelry, love letters, marriage papers, and photographs not containing evidence of crime. The agents later returned the jewelry to its owners. They also seized two locked metal boxes from the bedroom of the large house. Many irrelevant items were contained in the boxes, but the agents also found drug paraphernalia inside, including a gram scale and precursor chemicals. Pet. App. A7.

On August 18, 1981, DEA agents obtained a warrant authorizing them to search for and arrest petitioner at 9898 Silva Road in El Cajon, California. They did not find him there, but, while the agents were still in the house, a telephone answering machine received, recorded, and played aloud an incoming call to petitioner from Susanne Hickey, another co-conspirator. After the agents heard the message as it was played aloud, they rewound the tape in order to hear the message a second time. In doing so, they inadvertently rewound the tape past the Hickey call to the beginning of the tape. When the agents replayed the tape, they heard another previously recorded call from a woman who had recently rented a house to petitioner. The agents called the number that she had left on the message and learned the address of the rented house. The agents then went there and found and arrested petitioner. Pet. App. A12-A13. At that

address the agents also discovered an operating methamphetamine laboratory, and they subsequently seized, pursuant to a search warrant, methamphetamine powder and drug laboratory equipment as well as various documentary evidence linking petitioner to that residence (*id.* at A18-A19).

The district court denied petitioner's motion to suppress evidence seized in these searches. The court of appeals affirmed his convictions (Pet. App. A1-A30). With respect to the issues presented here, the court held that the Midway Drive search was not conducted in flagrant disregard of the limitations of the warrant and hence provided no basis for suppressing the evidence introduced at trial, which was within the scope of the warrant (*id.* at A10-A12). The court also held that the agents did not violate the Fourth Amendment in overhearing the telephone call from petitioner's realtor that had been recorded on the tape. The court held that there was no expectation of privacy in the call that was originally broadcast over the machine to anyone within earshot, that the agents were entitled to replay the message, and that the discovery of the other message was "inadvertent." *Id.* at A13-A17.

ARGUMENT

1. Petitioner contends (Pet. 6-10) that the search at 115 South Midway Drive exceeded the scope of the warrant in extending to certain private papers and belongings, and therefore that all evidence seized should be suppressed. This contention is without merit.

Petitioner's claim (Pet. 10) that the court of appeals reached a "novel" result that creates a "new exception" to the exclusionary rule could not be more misconceived. The courts of appeals have consistently held that items seized pursuant to a valid warrant are not to be excluded from evidence merely because the officers conducting the search

also seized items not specified in the warrant. See, *e.g.*, *United States* v. *Heldt*, 668 F.2d 1238, 1259-1269 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982); *United States* v. *Dunloy*, 584 F.2d 6, 11 n.4 (2d Cir. 1978); *United States* v. *Forsythe*, 560 F.2d 1127, 1134 (3d Cir. 1977); *United States* v. *Daniels*, 549 F.2d 665, 668 (9th Cir. 1977); *United States* v. *Mendoza*, 473 F.2d 692, 696-697 (5th Cir. 1972); *United States* v. *Holmes*, 452 F.2d 249, 259 (7th Cir. 1971), cert. denied, 405 U.S. 1016 and 407 U.S. 909 (1972). See also *Andresen* v. *Maryland*, 427 U.S. 463, 482 n.11 (1976). These decisions simply follow the well-established principle that evidence is not to be suppressed unless it is the "fruit" of an illegality. *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963). Indeed, it would serve no useful purpose — and would seriously impair law enforcement while distorting the actions and judgments of law enforcement agents — to penalize an error in the execution of a warrant by suppressing not only the fruits of that erroneous act but all the evidence seized pursuant to the warrant.

Even assuming, as the court of appeals did (see Pet. App. A12), that where officers executing a warrant flagrantly ignore its limitations, the exclusionary rule might require suppressing even items seized pursuant to the warrant, that does not aid petitioner. The court of appeals, after examining the facts of this case in detail, concluded that the search did not reflect a flagrant disregard for the terms of the warrant (*id.* at A10-A12).

The court noted that there was some question whether the agents conducting the search were adequately prepared as to the precise terms of the warrant, and it disapproved the removal of large quantities of papers and other items that only "*might* have been relevant to who lived or worked there" (Pet. App. A11 (emphasis in original)). The court

recognized, however, that the type of search involved here, where the warrant authorized search and seizure of "indicia of ownership and control of the premises" created practical difficulties for the executing officers (Pet. App. A11). The court concluded that the agents did not show a flagrant disregard for the warrant (*id.* at A11-A12). There is no reason for this Court to reevaluate the court of appeals' determination that the authorities — given the practical difficulties of this type of search — did not so exceed the permissible limits of the warrant as to call for the extreme measure of suppression of items specified in a valid warrant.[4]

2. Petitioner also contends (Pet. 10-17) that the agents violated the Fourth Amendment when they inadvertently overheard a message previously recorded on his telephone answering machine. This contention is without merit. On the extremely unusual facts presented here, which raise no recurring or important issue requiring this Court's consideration, the court of appeals correctly concluded that there was no Fourth Amendment violation.

It is not disputed that the agents lawfully entered the house at 9898 Silva Road in order to execute a search warrant for petitioner (see Pet. App. A14). While they were present, they unavoidably heard an incoming telephone call from Susanne Hickey as it was broadcast by a telephone answering machine. Obviously, the agents' overhearing of this call did not violate the Fourth Amendment. See, *e.g.*, *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983), slip op. 9 (plurality opinion); *Katz* v. *United States*, 389 U.S. 347, 351 (1967).

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[4]Only those things authorized by the warrant to be seized were admitted into evidence; the trial court ordered all irrelevant items to be returned (*id.* at A12).

Contrary to petitioner's contention (Pet. 17), the telephone call overheard by the agents clearly appears to have been incriminating. They recognized the voice of Hickey, a co-conspirator for whom they also had an arrest warrant, saying something to the effect of "The narcs are coming over to get me. * * * Somebody better * * * tell me what to do" (H. Tr. 643).[5] After hearing the broadcast of this message, the agents had probable cause to believe that the tape contained evidence that petitioner was engaged in narcotics traffic, and therefore they were authorized to seize it. See, *e.g.*, *Texas* v. *Brown*, slip op. 10-11 (plurality opinion). Before taking that step, however, it was reasonable for the agents to attempt to listen to the message again to confirm their suspicion that it was incriminating because they were not certain that they had heard the message correctly the first time (see H. Tr. 644-645).[6] Once the agents were lawfully attempting to listen again to the message they had already heard, the Fourth Amendment was not violated when they inadvertently, as both the district court and court of appeals found (see Pet. App. A17), overheard another message on the tape.

Petitioner's reliance (Pet. 12-13) on *Walter* v. *United States*, 447 U.S. 649 (1980), to challenge the validity of listening to the message again is misplaced. In *Walter*, although the private parties had already opened the packages and exposed the labels on the film containers, the films themselves had not been viewed until the government agents themselves viewed them. Thus, the projection of the

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[5]"H. Tr." refers to the transcript of the suppression hearing.

[6]Indeed, the agents' action in listening again to the message they had already heard to doublecheck their suspicion prior to seizing the tape was in a sense more protective of petitioner's interests because, if they proved to have been mistaken, it might have obviated the need to seize the tape.

films constituted an additional search, beyond any previously undertaken, that would be expected to disclose information not known to the officers; it is for that reason that the Court held that a warrant should have been obtained. See 447 U.S. at 656-657 (opinion of Stevens, J.). Here, by contrast, the broadcast of the incoming telephone call overheard by the agents exposed the entire contents of the simultaneously recorded message. There was no invasion of privacy in listening again to the tape recording of the message, when the agents had already heard what was recorded. See generally *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983), slip op. 5-7. See also *Walter*, 447 U.S. at 656, 659 n.14 (Stevens, J.); *id.* at 661 (White, J.); *id.* at 663 (Blackmun, J., dissenting); *United States* v. *Brand*, 556 F.2d 1312, 1317 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978).[7]

Finally, petitioner complains (Pet. 13-16) that the court of appeals erred in declining to consider, on the ground that it was not properly raised below, his claim that the agents had already overstayed their lawful presence on the premises when they overheard the telephone messages (see Pet. App. A14-A16). However, this was clearly a proper exercise of the court of appeals' authority. See Fed. R. Crim. P. 12(b)(3) and (e). Because the issue was not raised in the district court, a complete factual record was not made on this question at the suppression hearing, and the district court was not asked to and did not make a finding on it. Thus, the court of appeals had no basis on which to assess

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[7]Had the agents deliberately listened to the portion of the tape that they had not heard before, *Walter* would indeed be relevant and would suggest that the agents' action was an unlawful search. However, both courts below found that the agents inadvertently overheard the other message, and there is no reason for this Court to reexamine that factual determination. See, *e.g.*, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

petitioner's claim and acted properly in refusing to consider it for the first time on appeal.[8]

Petitioner's further contention (Pet. 15-16) that, in light of the court of appeals' refusal to consider this claim, the government failed to carry its burden of proving that the agents were lawfully on the premises is fanciful. It is undisputed that the entry into the house was authorized by a valid search to arrest warrant (Pet. App. A14). This showing plainly satisfied the government's burden of proof in the absence of any showing by petitioner that would rebut the fact of lawful presence on the premises.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8]To the extent the record sheds any light on the question, it suggests that the agents likely were lawfully in the house when they heard the telephone call. It took some time to make certain that petitioner was not present and to interview the people who were in the house in order to determine whether they too were wanted on arrest warrants (see H. Tr. 511-515). The record does not indicate that the agents remained on the premises beyond the time necessary to fulfill their duties in connection with the warrant.